AU KING CHOR & ORS.

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID ACTING LP
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CRIMINAL APPLICATION NOS. 17 & 18 OF 1984]
14 NOVEMBER 1984

CRIMINAL LAW AND PROCEDURE: *Application for leave to be granted for determination by the Court of a question of law of public interest - Principles to be exercised by the Court in deciding such an application for leave.*

The accused were tried under the Dangerous Drugs Act 1952 and in the course of the trial, the learned Judge admitted two prosecution exhibits, one a record of payment by credit card for hotel charges and the other, the hotel guest registration card. The two applications for leave evolved around these questions:

(i) Whether the learned trial Judge in admitting documentary evidence under s. 32 of the Evidence Act 1950 was right in having done so without holding a proper inquiry or trial-within-a-trial to determine their admissibility.

(ii) Whether the learned trial Judge was right in admitting the documentary evidence made either wholly or in part by the accused without its makers being called to tender and produce them.

The respondent Public Prosecutor objected to the applications by contending that these applications were for the determination of a question of law rather than to appeal against an order made by the High Court contrary to s. 50(3A)(i) of the Courts of Judicature Act. The appellants thereafter asked to amend the Notice of Motion to comply with the requirement of s. 50(3A)(i). The Federal Court allowed the amendment and proceeded to hear the applications.

Held:

[1] An application for leave under s. 50(3A)(i) is similar to s. 66 Courts of Judicature Act in that the Court has to first be satisfied that there is a question of law of public interest to be determined.

[2] The proper test for determining whether a question of law is of public interest would be whether it directly or substantially affects the right of the parties and also whether it is an issue not yet finally settled by the Federal Court or Privy Council or free from difficulty or calls for discussion of alternative views. If the general principles deciding the question are settled, that question would not be a question of law of public interest.

[3] As to what circumstances an order involving a question of law affects or is said to have affected the course of the trial will depend on the nature of the order, the stage of the trial and whether it would have the effect of bringing to a halt or suspending the progress of the proceedings.

[4] The Federal Court should grant leave only in exceptional cases. As this appeal evolved around the admissibility of documents, it was a question answered by established principles and therefore not one of public interest.

[Applications dismissed.]

Case referred to:
A. Ragunathan v. Pendakwa Raya [1982] 1 MLJ 139; [1982] CLJ (Rep) 63

Legislation referred to:
Courts of Judicature Act 1964, ss. 50(3A)(i), 66
Evidence Act 1950, s. 32

For the 1st, 5th and 6th applicants - Karpal Singh; M/s. Karpal Singh & Co.
For the 2nd applicant - V. Sithambaram;
For the 8th & 9th applicants - K. Kumaraendran; M/s. Kumar & Co.
For the 3rd, 4th & 7th applicants - R. Rajasingam; M/s. Rajasingam & Co.
For the respondent - Mokhtar Abdullah, SFC

JUDGMENT

Abdul Hamid Acting LP:

There were two criminal applications before the Court (Federal Court Criminal Applications Nos. 17 and 18 of 1984) for leave under s. 50 (3A)(i) of the Courts of Judicature Act (hereafter called the Act). They were made by five accused in Criminal Trials No. 10-14 of 1983 and four others in Criminal Trial No. 29 of 1984, all of whom have been charged and are being tried under the Dangerous Drugs Act 1952 (Revised 1982).

In Criminal Application No. 17/84, the applicants asked for leave to be granted for the determination by the Court of a question of law of public interest pursuant to s. 50(3A)(i) of the Act as follows:

> Whether the learned trial Judge in admitting documentary evidence under s. 32 of the Evidence Act 1950 was right in having done so without holding a proper inquiry or trial-within-a-trial to determine their admissibility.

In Criminal Application No. 18/84, they asked for leave that the following question of law of public interest be determined:

> Whether the learned trial Judge was right in admitting the documentary evidence made either wholly or in part by the accused without its makers being called to tender and produce them.

Encik Mokhtar Abdullah for the respondent Public Prosecutor raised a preliminary objection contending that since the leave sought by the applicants was not to appeal against an order made by the High Court but for the determination of a question of law this was contrary to the provisions of s. 50(3A)(i) of the Act. We see merit in the submission and we agree. Section 50(3A)(i) of the Act clearly provides that an application under this section should be for leave to appeal against an order made by the High Court. Section 50(3A)(i) reads:

> (3A)(i) Notwithstanding the preceding provisions of this section, either party may apply to the Federal Court for leave to appeal against any other order made by the High Court involving a question of law of public interest that would affect or has affected the course of the trial in the exercise of its original criminal jurisdiction.

It is to be observed that in an application under this section it is necessary to set out in the Notice of Motion or in the supporting affidavit or in both the order in respect of which leave to appeal is sought. It should also contain an averment that leave to appeal is against an order involving a question of law of public interest and, a further averment as to how the order would or has affected (whichever is appropriate) the course of the trial by the High Court in the exercise of its original criminal jurisdiction.

As for the application before us, we are not satisfied that they have conformed with the requirements of the section. We however allowed the applicants to amend the Notice of Motion and proceeded to hear the applications.

The facts in so far as they are relevant for purposes of these applications briefly are that the trial against all of them commenced on 11 September 1984. The accused in Criminal Trials Nos. 10, 11, 12, 13 and 14 of 1983 and the accused in Criminal Trial No. 29 of 1984 were jointly tried. In the course of the trial the learned Judge admitted two prosecution exhibits P47 and P48, the former a record of payment made by credit card in settlement of dues from the hotel guests in satisfaction for services rendered by the hotel a copy of which belonged and was kept by the hotel in its normal course of business, and the latter the guests' registration card, the property of the hotel, required under the Thai law to be filled by the guests upon checking into the hotel (Criminal Application No. 17/84).

In the case of Criminal Application No. 18/84, the application arose as a result of the learned Judge's order admitting prosecution Exhibits P7, P9 and P11. These documents were apparently prepared by the hotel employees and kept by the hotel in compliance with the Thai law.

Mr. Karpal Singh, Counsel for applicants 1, 5 and 6, supported by Mr. Sithambaram for applicant 2, Mr. Rajasingam for applicants 3, 4 and 7, and Mr. Kumaraendran for applicants 8 and 9, submitted that this was a proper case for leave to appeal to be granted as the orders made by the High Court involved a question of law of public interest affecting the course of the trial.

Encik Mokhtar Abdullah, on the other hand, contended that this was not a proper case for leave to appeal to be granted.

An application under s. 50(3A)(i) of the Act is somewhat similar to an application under s. 66 of the Act which requires the Court, before it decides to grant leave, to be satisfied that there is a question of law of public interest that calls for its determination. The principles governing an application under s. 66 are adequately set out in this Court's decision in *A.Ragunathan v. Pendakwa Raya* [1982] CLJ (Rep) 63 where Raja Azlan Shah, Ag. LP (as he then was) delivering the judgment of the Court had this to say:

> Section 66 of the Courts of Judicature Act requires that before we decide to answer any question referred under it we have to be satisfied that it is a question of law of public interest which has arisen in the course of appeal, the determination of which by the Judge has affected the event of the appeal. The section cannot be invoked by raising a ground which in his grounds of appeal and in the course of his submission, Counsel for the applicant described as a mere question of law. Besides being that, it must be of public interest which arose in the course of the appeal and which determined the appeal.

He went on to state at p. 141:

> But it is not sufficient that the question raised is a question of law. It must be a question of law of public interest. What is public interest must surely depend upon the facts and circumstances of each case. We think that the proper test for determining whether a question

> of law raised in the course of the appeal is of public interest would be whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that is not finally settled by this Court or the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest.

And at p. 142 he further stated:

> For ourselves, we are of the view that for the purpose of s. 66 of the Courts of Judicature Act it is not a proper exercise of our discretion to answer questions where the answers are already provided by well settled general principles, which have to be applied to the facts of the case.
>
> But basically, we must consistently decline to receive and answer questions which though they may be questions of law are nevertheless not questions of law of public interest, in the sense as we understand it, that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject: see s. 66(6)(a) Courts of Judicature Act, 1964.

Applying these principles to the matter under consideration, we are firmly of the view that before this Court grants leave to appeal under s. 50(3A)(i) of the Act against an order made by the High Court, this Court has to be satisfied that there is arisen from such order a question of law of public interest which would either affect or has affected the course of the trial. We would stress that it is not sufficient that the question involved is a mere question of law but must also be a question of law of public interest. What then is public interest? To use the words of Raja Azlan Shah, Ag. LP (as he then was) this "must surely depend upon the facts and circumstances of each case". And the test for determining whether a question of law involved is of public interest is, again to use the words in *Ragunathan's* case, that "it directly and substantially affects the rights of the parties" in the sense that "it is an open question ... not finally settled by this Court or the Privy Council ... not free from difficulty" and which requires further discussion of alternative views. In effect it means that a question of law cannot be said to be one of public interest if the general principles in determining the question are already firmly established and all that remains to be done is to apply those principles to the facts of the case.

An application for leave to appeal against an order made by the High Court involving a question of law under s. 50(3A)(i) is, in that sense, similar to an application for leave for the determination of a question of law under s. 66 of the Act. However there seems to be a distinguishing feature. The clear words of s. 50(3A)(i) indicate that fundamentally the order the party seeks to appeal should not only involve a question of law of public interest but must also be one which would affect or has affected the course of the trial. It entails, in our view, some element of finality in the order such that it would affect or has affected the course of the trial meaning the passage or progress of the proceedings.

The position under s. 66 of the Act is that it requires the question of law determined by the High Court and sought to be referred to the Federal Court for its determination to be one which has affected the event of the appeal, and has influenced the result of the appeal and in the sense that there is a finality in the decision. Section 50(3A)(i), on the other hand, although it does not contain similar words such as "has affected the event of the appeal", but contains the words "would or has affected the course of the trial", we are nonetheless of the view that they do produce substantially similar effect. Assuming for a moment that

this is not what is intended by the legislature we can only foresee an intolerable position emerging and the trial Court shall have to accede to numerous requests for postponements to enable each party to appeal against an order made in the course of the trial whereby the entire progress of the trial would be frustrated.

The next question therefore is under what circumstances does an order involving question of law affect or be said to have affected the course of the trial? The answer to that would depend much upon the nature of the order, the stage of the trial at which it is made, and whether having regard to the circumstances of that case it would have the effect of bringing to a halt or suspending the progress of the proceedings.

It is pertinent to note that the opening words of sub-section (3A)(i) of s. 50 of the Act indicate that this sub-section is in effect an exception to sub-section (1) of the Act which confers jurisdiction upon the Federal Court to hear and determine an appeal against a decision made by the High Court in the exercise of its original criminal jurisdiction which appeal, *inter alia*, relates to an appeal by a person convicted or otherwise found guilty against either a conviction or finding of guilt or against sentence or against both. Our view therefore is leave should only be given in exceptional cases. This Court should be very slow to exercise its discretion to grant leave to a party to appeal against an order made by the High Court in the exercise of its original criminal jurisdiction. We would emphasise that while an application under s. 66 of the Act is for leave for the determination by the Federal Court of a question of law of public interest, an application under s. 50(3A)(i) is strictly for leave to appeal against any order made by the High Court. In considering therefore whether this Court should exercise its discretion, it must primarily be satisfied that it is not only an exceptional case but it is a fit and proper case for leave to be granted to appeal against the order.

We now turn to the application before us. Both orders which the applicants are seeking leave to appeal were orders concerning the admissibility of certain documents. The question of admissibility of documents *per se* is a question of law and we do not think there is any doubt about that. But the question is whether it is a question of law of public interest? It is for the applicants to satisfy us that it is. The onus therefore is upon the applicants to show that the general principles governing the admissibility of documents are not firmly established or far from finally settled that it is in the public interest the law is reviewed or alternative views be found. We hardly think so. Fundamentally the general principles governing admissibility of documents are already firmly established and well settled and what remains to be done shall be to apply these settled principles to the facts of the case. That being the case, we are unable to say that the orders involved a question of law of public interest. For these reasons, we declined leave and dismissed the applications.

Also found at [1985] 1 CLJ 122